

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S REPLY
BRIEF**

75-6132

To be argued by
RICHARD BROOK

75-6140

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

GEORGE RIOS, et al.,

Plaintiffs-Appellants,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638
OF U.A., et al.,

Defendants-Appellees.

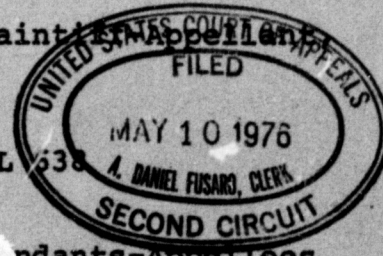
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiffs-Appellants

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638
OF U.A., et al.,

Defendants-Appellees.



ON APPEAL FROM UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SUR-REPLY BRIEF FOR
DEFENDANT-APPELLEE-APPELLANT
ENTERPRISE ASSOCIATION STEAMFITTERS
LOCAL 638 OF U.A.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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GEORGE RIOS, et al., :

Plaintiffs-Appellants, :

-against- :

ENTERPRISE ASSOCIATION STEAMFITTERS
LOCAL 638 OF U.A., et al., :

Defendants-Appellees.
-----x

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, :

Plaintiff-Appellant, :

-against- :

ENTERPRISE ASSOCIATION STEAMFITTERS
LOCAL 638 OF U.A., et al., :

Defendants-Appellees
-----x

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUR-REPLY BRIEF FOR DEFENDANT-APPELLEE-APPELLANT
ENTERPRISE ASSOCIATION STEAMFITTERS
LOCAL 638 OF U.A.

PRELIMINARY STATEMENT

Pursuant to Rule 28(c) of the Federal Rules of Appellate Procedure, Defendant-Appellee-Cross-Appellant Enterprise Association Steamfitters Local 638 of U.A. (hereinafter referred to as "Local 638" or the "Union") submits this brief in reply to the response of appellant Equal Employment Opportunity Commission (hereinafter referred to as "E.E.O.C.") to the issues presented by the cross appeal.

ARGUMENT

POINT I

THE UNION'S FINANCIAL CONDITION WAS
BEFORE THE DISTRICT COURT AND IS A
HIGHLY RELEVANT FACTOR IN DETERMINING
APPROPRIATE TITLE VII REMEDIES

Contrary to the assertion of appellant E.E.O.C., evidence of the Union's financial condition was before the district court, and properly so. As indicated in the Union's prior brief to this Court, Judge Bonsal recognized the severe unemployment in the construction steamfitting industry and the Union's crippled financial condition. See Brief for Defendant-Appellee Local 638 at 12, 24, 34-37 and references to the record made therein. The record is clear that a back pay award that was not subject to drastic

reduction would mean the demise of the Union and the concurrent cessation of the affirmative relief ordered by the district court.

While the Supreme Court in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) and this Court in E.E.O.C. v. Local 28 Sheet Metal Workers, ____ F. 2d ____, slip. op. 2481 (2d Cir. March 8, 1976) recognized that as a general principle back pay should be awarded, this precept was not made absolute. Rather, the Supreme Court recognized that there might exist circumstances peculiar to the particular case involved where an award of back pay would be inappropriate. Albemarle, supra, 422 U.S. at 421-422.

While the Union contends that under the facts and circumstances peculiar to this case an award of back pay was improper, the Union maintains that, in the alternative, the district court's decision to consider a pro rata reduction of awards was a proper exercise of discretion. Yet in their brief to this Court, appellants seemingly reject the idea that the district court retains any discretion in determining appropriate Title VII remedies. Indeed, appellant E.E.O.C. takes a startlingly hypocritical position with regard to the propriety of a pro rata reduction of back pay awards. Thus, while in the instant case appellant E.E.O.C. urges this Court to reject the district court's reservation of the

right to reduce the awards pro rata, in its brief to this Court in the case of E.E.O.C. v. Local 28, supra, the E.E.O.C. stated:

"It is submitted that if the District Court may in its discretion take into account individual financial circumstances of unions or employers, it might more properly pro rate or order deferral of awards rather than eliminate whole categories of non-whites...." Brief for Plaintiff-Appellee E.E.O.C. in E.E.O.C. v. Local 28, supra, at 49 (emphasis added).

And despite appellant E.E.O.C.'s implication at page 12 of their reply brief in the instant case, the question of the propriety of a pro rata reduction was not before this Court in the Local 28 case. See Brief for plaintiff-appellee E.E.O.C. in E.E.O.C. v. Local 28, supra, at 49, n.***.

The Union respectfully submits that appellants have assumed a posture in the instant case that will not only destroy the Union and the affirmative relief ordered by the court below, but which will thwart the remedial policy of Title VII, i.e., to fashion the most complete relief possible. Albemarle, supra, 422 U.S. at 421-422. The district court recognized that what cannot be done should not be compelled. Appellants lose all credibility in contending that the district court erred in reserving the right to reduce back pay awards.

POINT II

THE PROPRIETY OF THE DISTRICT COURT'S
RESERVATION OF THE RIGHT TO MAKE A
PRO RATA REDUCTION OF AWARDS IS
PROPERLY BEFORE THIS COURT

In the briefs to this Court on the motion by Local 638 to dismiss the instant appeals and on the joint cross-motion of appellants Rios and E.E.O.C. for permission to allow the district court to entertain a motion for nunc pro tunc certification, all parties briefed the issue of the propriety of appeals at a time when the amount of liability was yet ascertained. Yet appellant E.E.O.C., after successfully obtaining certification from the district court and from this Court pursuant to 28 U.S.C. §1292(b), now asserts that evidence regarding the Union's ability to pay is premature. Reply brief for E.E.O.C. at 10.

This Court, in permitting the instant interlocutory appeals, has accepted review of the district court's order of October 17, 1975. Indeed, in certifying this order, the district court expressly referred to the Union's lack of funds as involving a controlling question of law as to which there existed substantial grounds for difference of opinion. Moreover, all parties to the instant appeals have raised and extensively briefed the issues of the Union's ability to pay and of the propriety of a pro rata reduction. Appellant

E.E.O.C. should not be permitted to raise the questions of "prematurity" and "speculation" where this Court, aware of the fact that these factors existed, accepted interlocutory review at the E.E.O.C.'s request in order to resolve, inter alia, the issues of whether the Union's ability to pay was a relevant factor in determining the extent of back pay relief and whether the district court properly exercised its discretion in reserving the right to make a pro rata reduction of awards.

Finally, Judge Bonsal merely reserved the right to make a pro rata reduction; he has not yet made such a reduction. He reserved the right to do so because the facts before him indicated the Union's near certain inability to pay a substantial back pay award. A-775. Further evidence on this issue is certainly allowed and perhaps was expressly contemplated by Judge Bonsal, who stated that "for good cause shown" by the Union, he may make a pro rata reduction, A-775. Thus, plaintiffs could attempt to contradict facts regarding the Union's financial condition at a later date. We merely ask this Court to expressly rule favorably upon the district court's right to make such a reduction.

CONCLUSION

For the reasons set forth in the Union's briefs to this Court, we respectfully submit that should this Court determine that some back pay must be awarded, the district court be directed to reduce such awards to the extent necessary to allow the continued operation of the Union and of the affirmative action plan.

Dated: New York, New York
May 10, 1976

Respectfully submitted,

DELSON & GORDON
Attorneys for Defendant-Appellee-
Appellant Enterprise Association
Steamfitters Local 638 of U.A.

Richard Brook,
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

GEORGE RIOS, et al.,	:	
Plaintiffs-Appellants	:	75-7646
	:	75-7668
-against-	:	
ENTERPRISE ASSOCIATION STEAMFITTERS	:	
LOCAL 638 of U.A., et al.,	:	
Defendants-Appellees.	:	AFFIDAVIT OF
	:	SERVICE
-----X		
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	:	
Plaintiff-Appellant,	:	75-6132
	:	75-6140
-against-	:	
ENTERPRISE ASSOCIATION STEAMFITTERS	:	
LOCAL 638 of U.A., et al.,	:	
Defendants-Appellees.	:	
-----X		

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

HENRY C. MAIMIN, being duly sworn, deposes and
says:

1. Deponent is not a party to the action, is
over 18 years of age and resides at 1175 York Avenue,
New York, New York.
2. On May 10, 1976 deponent served two copies
of the within Sur-reply Brief of Defendant-Appellee-Appellant
Enterprise Association Steamfitters Local 638 of U.A. upon:

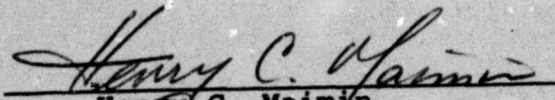
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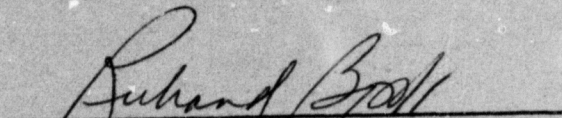
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the addresses designated by said attorneys for that purpose
by depositing two copies of same in a post-paid properly
addressed wrapper in an official depository under the
exclusive care and custody of the United States Postal
Service, within the State of New York.


Henry C. Maimin

Sworn to before me this
10th day of May, 1976


Notary Public

RICHARD BROOK
NOTARY PUBLIC, State of New York
No. 30-02BR5463750
Qualified in Nassau County
Commission Expires March 30, 1978

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification
By Attorneycertifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.☐ Attorney's
Affirmation

shows: deponent is

the attorney(s) of record for

in the within action; deponent has read the foregoing
and knows the contents thereof; the same istrue to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief,
and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

being duly sworn, deposes and says: deponent is

☐ Individual
Verification

the

the foregoing
deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as
to those matters deponent believes it to be true.☐ Corporate
Verificationthe
a
corporation,in the within action; deponent has read the
and knows the contents thereof; and the same
is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and
belief, and as to those matters deponent believes it to be true. This verification is made by deponent because
is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

being duly sworn, deposes and says: deponent is not a party to the action,

is over 18 years of age and resides at

☐ Affidavit
of Service
By Mail

On

19

deponent served the within

upon

attorney(s) for

in this action, at

the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.☐ Affidavit
of Personal
Service

On

19

at

deponent served the within

upon

herein, by delivering a true copy thereof to h personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on

19

The name signed must be printed beneath

NOTICE OF ENTRY

Sir:- Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,

DELSON & GORDON

Attorneys for

Office and Post Office Address

230 Park Avenue

Borough of Manhattan New York, N. Y. 10017

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:- Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.

Dated,

Yours, etc.,

DELSON & GORDON

Attorneys for

Office and Post Office Address

230 Park Avenue

Borough of Manhattan New York, N. Y. 10017

To

Index No.

75-6132

75-6140

75-7646

75-7668

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**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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-v-

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Defendants-Appellees.**

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COMMISSION,
Plaintiff-Appellant,**

-v-

**ENTERPRISE ASSOCIATION STEAMFITTERS, etc.
Defendants-Appellees**

AFFIDAVIT OF SERVICE

DELSON & GORDON

Attorneys for **Local 638**

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(212) MU 6-8030

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for